No. 24-361

In the Supreme Court of the United States

SPEECH FIRST, INC.,

Petitioner,

V.

PAMELA WHITTEN, in her official capacity as President of Indiana University, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a Free Speech Clause challenge to a university program unlikely to succeed where the challenger fails to show that the program is reasonably perceived to coerce speech, especially where the program expressly disclaims disciplinary consequences?

RELATED PROCEEDINGS

The petition correctly identifies the proceedings below, except that the district court's order issued on August 28, 2024, not August 8, 2024. The proceedings below were thus:

United States District Court (S.D. Ind.):

Speech First, Inc. v. Whitten, No. 1:24-cv-00898 (Aug. 28, 2024) (order denying motion for preliminary injunction)

United States Court of Appeals (7th Cir.):

Speech First, Inc. v. Whitten, No. 24-2501 (Sept. 5, 2024) (order below)

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INTRODUCTION

Indiana University is expressly committed to encouraging free expression while offering educational opportunities to foster an inclusive and respectful environment. Among its initiatives is a bias response and education program ("Program"), which provides support and resources not only to those who experience reportedly bias-motivated incidents but also to the broader IU community. Given that the Program's express, "primary goal" is to provide that "support to the individual or community" reportedly affected by such incidents, the Program makes emphatically clear on the face of its website that, *e.g.*, "[t]ak[ing] disciplinary action," "[c]onduct[ing] formal investigations," and "[i]mping[ing] on free speech" are examples of "**What We Don't Do**" in connection with the incidents, which are undisputedly *not* Student Code violations.

Enter Speech First, Inc., a frequent filer of lawsuits against higher-education institutions nationally. Speech First recently filed this case seeking to preliminarily enjoin IU's Program, purportedly on behalf of several anonymous members who speculate that, somehow as a result of the Program, someone "will take action against" them. Speech First urged the courts below to "promptly" deny the motion for lack of standing, confessing inability to distinguish *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020), where, citing the district court's extensive factual findings, the Seventh Circuit affirmed Speech First's lack of standing to seek such relief against another university. [App. 1a-14a.] In reply, IU pointed out

that *Killeen* is far from the only authority confirming the jurisdictional deficiency, which is even clearer here than it was in that prior litigation.

Now that the courts below have found standing lacking, Speech First suggests that the Seventh Circuit's correct, factbound application of settled standards of review and standing principles somehow warrants this Court's review, lest a "literal speech police" impose its "oppressive," "Orwellian" will upon "millions" nationwide. The reality is much more mundane, and not remotely certworthy.

First, despite Speech First's suggestion that the IU Program at issue should be viewed in its specific context, Speech First improperly asks this Court to decide an abstract question that focuses on some hypothetical composite of "bias-response teams," rather than on the facts of this case.

Next, although Speech First hopes that answering this abstract inquiry will help resolve a "3-1 split," this alleged split is illusory, as it arises from the false premise that the Seventh Circuit broke from three others by supposedly holding "[t]he government can[not] objectively chill speech without directly prohibiting it." [Pet. 27; *accord id.* at 14, 32.] Yet the Seventh Circuit held no such thing, instead correctly applying the settled law and standards of review. The claimed split does not exist.

Last, this case is a singularly poor vehicle for reaching Speech First's question, particularly as Speech First has not even identified the specific IU students whose speech is allegedly chilled. This Court should deny certiorari.

STATEMENT OF THE CASE

A. Indiana University's Bias Response & Education Program.

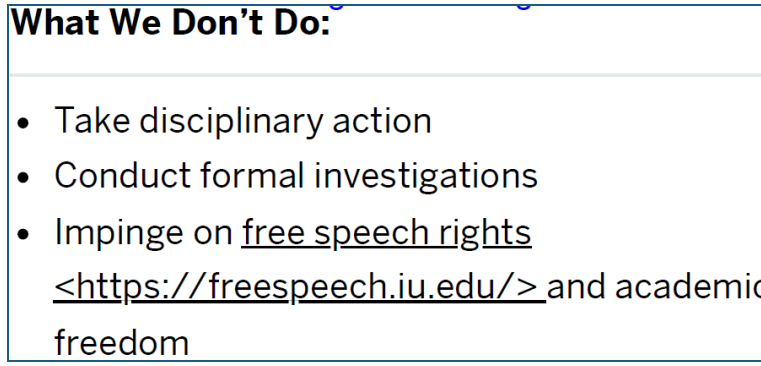
Indiana University (IU) is an institution of higher education that "encourages the free and civil exchange of ideas" such that "all voices"—even if "controversial and uncomfortable"—"are heard and valued." [ECF9-12 at 5; ECF9-19 at 4-5; ECF25-3; ECF25-4; ECF25-5; *accord, e.g.*, ECF25-1 at ¶ 3; ECF25-2 at ¶ 3.] One way that IU "further[s] this mission," per the "policy" material Speech First attacks, is through the Program [ECF9-12 at 4; ECF9-19 at 3]. In essence, after "privately review[ing]" reports of an IU member (*e.g.*, faculty or student) about incidents of perceived bias, the Program "provide[s] support resources to impacted parties" and "promote[s] education and dialogue." [ECF9-12 at 2-4 & ECF9-19 at 3.][1]

Put differently, the Program promotes education and offers support as necessary—all on an entirely voluntary basis—to those reportedly involved in or affected by bias-motivated incidents. [ECF25-2 at ¶¶ 3-4, 7, 17; ECF25-1 at ¶¶ 3-4, 7, 17; ECF25-3; ECF25-4; ECF25-5.] As part of this mission, the Program provides students a forum on campus to engage in private, voluntary discussions with the Program staff in order to help promote productive dialogue about such incidents, which can be reported to the Program online and are many

[1] Unless otherwise noted, "ECF" citations are to filings on the district court docket below, with any pagination pincites being to electronic-header pagination.

times reported anonymously. [ECF25-2 at ¶¶ 3-4, 7, 17; ECF25-1 at ¶¶ 3-4, 7, 17; ECF25-3; ECF25-4; ECF25-5; ECF25-16.] The Program also provides opportunities for education, particularly through community workshops, conversations, and presentations that expressly recognize that controversial, offensive, and hateful speech is still constitutionally protected speech. [ECF25-2 at ¶¶ 3-4; ECF25-1 at ¶¶ 3-4; ECF25-3; ECF25-4; ECF25-5.] "The primary goal," at bottom, "is to provide support to the individual or community impacted." [ECF9-14 at 2.]

Equally clear on the face of the challenged policy is "**What We Don't Do**." [ECF9-12 at 5 & ECF9-19 at 4.] Prominently listed examples include not only "[c]onduct[ing] formal investigations" but also "[t]ak[ing] disciplinary action," per the below snapshot of ECF9-12's language [*see also* ECF9-19]:


What We Don't Do:

- Take disciplinary action
- Conduct formal investigations
- Impinge on free speech rights <https://freespeech.iu.edu/> and academic freedom

Speech First is thus forced to "admit[] that [the Program] lacks disciplinary authority." [App. 13a (cite omitted).] Indeed, "[t]he bias incident response," the Program material unequivocally explains, has "no[] sanctioning bodies and do[es] not

determine or implement consequences." [ECF9-19 at 4 ("if you believe the incident is criminal or violates the student code of conduct or university policy," then "*[o]ther* reporting offices"—*i.e.*, the "University Police" for "criminal activity" or the "Office of Student Conduct" for a "student policy violation," *not* the Program—are "the appropriate" offices to contact (emphasis added)).]

Any student engagement with IU's Program is "entirely voluntary." [App. 7a (cites omitted).] In situations where the Program staff tries to contact any involved student, it will reach out by email to the reporting individual—if identified—and offer to meet. [ECF25-2 at ¶ 21; ECF25-1 at ¶ 21.] If the reporting individual wishes to meet, the Program's staff will discuss the report with that individual and offer support. [ECF25-2 at ¶ 21; ECF25-1 at ¶ 21.] Most reports do not identify any individual(s) perceived to engage in a bias-motivated incident, and the Program does not contact any such individual in those circumstances. [ECF25-2 at ¶¶ 5, 22; ECF25-1 at ¶¶ 5, 22.] As for the relatively few reports that do identify someone whose conduct was perceived to be bias-motivated, in some of those instances the Program will contact that person by email, asking to schedule an optional meeting. [ECF25-2 at ¶¶ 5, 22; ECF25-1 at ¶¶ 5, 22.]

These meetings are, again, entirely voluntary: students who decline to meet (or who do not respond to the optional invitation) suffer no consequences whatsoever—the Program's involvement is deemed complete at that point. [ECF25-2 at ¶ 22; ECF25-1 at ¶ 22; *accord* App. 13a (Speech First "admits that

students are not punished for declining to meet" (cite omitted)).] Numerous students who receive such Program emails offering to meet either do not respond at all or decline to have the voluntary meeting. [ECF25-1 at ¶ 22; *accord* ECF25-2 at ¶ 22 ("the majority" of such students at Indianapolis campus ignore or decline such invitations).]

If a student opts to meet, "[the Program] does not ask or require [them] to change what they do or say and leaves no doubt that [they] are not … in trouble" or "being charged with any Code violation." [App. 7a; ECF25-2 at ¶ 23; ECF25-1 at ¶ 23 (instead, the Program will give the student an opportunity to talk about his or her reaction or perspective).] As Speech First admits [App. 13a (cite omitted)], Program incident reports are not recorded in students' academic or disciplinary records. [ECF25-2 at ¶¶ 18, 24-25 (the Program does not publicly disseminate aggregate data from reports or include personally identifiable information in any such aggregation); ECF25-1 at ¶¶ 18, 24-25 (same).]

The Program's authority is limited in ways critical to Speech First's allegations. The Program cannot compel students to speak with them about alleged bias-motivated incidents. [ECF25-2 at ¶¶ 3, 5-7, 13, 20, 22-23; ECF25-1 at ¶¶ 3, 5-7, 13, 20, 22-23.] If a student declines (as many students do) to speak with the Program, the student is not sanctioned in any way. [ECF25-2 at ¶¶ 5, 22; ECF25-1 at ¶¶ 5, 22.] In addition, the Program cannot make a "finding" that a bias-motivated incident has or has not occurred, nor does it have any disciplinary function at all. [ECF25-2 at ¶ 6; ECF25-

1 at ¶ 6.] Despite Speech First's faulty premise that the Program is "representative of" bias-response teams that "usually" are "staffed by," *e.g.*, "police officers" and are "a literal speech police" [Pet. 7, 23], the Program has no law-enforcement staff or liaison. [ECF25-2 at ¶ 8; ECF25-1 at ¶ 8 (its Bloomington, Indiana "staff consists of two individuals," "neither of whom is law-enforcement personnel").] It cannot and does not impose discipline of any kind. [ECF25-2 at ¶¶ 3, 4-6, 13-14, 16, 22, 39; ECF25-1 at ¶¶ 3, 4-6, 13-14, 16, 22, 39.] If, after meeting, a student wishes to continue his or her conduct, the student has the right to do so without penalty. [ECF25-2 at ¶ 23; ECF25-1 at ¶ 23.]

IU's Program is entirely distinct from the student disciplinary procedures that apply to charged violations of the Student Code. [ECF25-2 at ¶¶ 11-13; ECF25-1 at ¶¶ 11-13.] This is why Speech First "admits that [b]ias-motivated speech alone is not a Student Code violation." [App. 13a (cite omitted); *accord, e.g.*, ECF25-2 at ¶¶ 9, 14-16; ECF25-1 at ¶¶ 9, 14; ECF25-10; ECF10 at 12-13.] Indeed, although potential Code violations are addressed through formal procedures, including mandatory student participation in conferences and aspects of the investigation, a formally announced outcome, and, if appropriate, discipline [ECF25-2 at ¶¶ 11-12; ECF25-1 at ¶¶ 11-12], IU's Program has none of those features. [ECF25-2 at ¶ 13; ECF25-1 at ¶ 13].

Another of the Program's express examples (omitted from the petition) of "**What We Don't Do**" is: "Impinge on free speech rights <https://freespeech.iu.edu/> and academic freedom."

[ECF9-12 at 5 & ECF9-19 at 4.] IU's website at that URL further links to "FAQs" [ECF25-6 at 2], which note that "[s]peech that is hateful, offensive, or inconsistent with [IU's] values is nonetheless protected under the First Amendment" [ECF25-7 at 3].

The freespeech.iu.edu page also links to "Policies" [ECF25-6 at 2], including, among other "Free Speech Policies," one entitled "The First Amendment at Indiana University" [ECF25-8 at 2; ECF25-6 at 2 ("As an educational institution, [IU] is dedicated to fostering an environment that values a culture of open dialogue and free expression on all our campuses. IU will protect, as far as possible, the physical safety of all members of our community, including speakers, supporters, and protestors, regardless of their views or affiliations.")]. As this First Amendment Policy further confirms:

> In accordance with its responsibilities under the First Amendment of the U.S. Constitution and Indiana law, [IU] affords and is committed to protecting the rights of students, academic appointees, staff, student organizations, contractors, and invited guests and visitors to free speech and expressive activity, such as assembling and speaking in public areas of campus, as well as writing, publishing, and inviting speakers on any subject.

[ECF25-9 at 4-8 ("Any violations of this policy by IU Community Members (faculty, staff, academic staff, contractors, students, student organizations, or

volunteers) will be addressed … in accordance with applicable [IU] policies and procedures, which may include disciplinary actions up to and including dismissal or termination from [IU]" (link in original)).]

Beyond the challenged material itself [*e.g.*, ECF25-3; ECF25-4; ECF25-5], IU's Program also repeatedly emphasizes freedom of speech in other public statements. [ECF25-2 at ¶¶ 27-28; ECF25-1 at ¶¶ 27-28.] For instance, when discussing the Program publicly, its leadership "encourag[es] [students] to visit the free speech website here at IU" [ECF25-1 at ¶ 27; ECF9-8 at 2 (referencing video accessible at perma.cc/L67G-P3L9)], and stating that "in the United States … you can say" words that "don't feel good" to others [ECF9-18].

B. Speech First sues but successfully opposes its own motion for university-wide preliminary injunction, conceding inability to distinguish precedent foreclosing standing.

In May 2024, Speech First—an advocacy group that sues universities nationwide—sued 16 IU administrators to put a halt to the "policy" across the entire IU system, claiming to have five anonymous, IU-enrolled members who feel "chilled" by it. [ECF1 at ¶¶ 4, 11-18.] These members do not claim any "action" has been taken against them for speech, but they "worr[y]" that, someday, it might. [ECF1 at ¶¶ 58, 70, 82, 95, 107.]

To enforce Seventh-Circuit law on pseudonymity, the district court's Local Rule 10-1

provides that, "[i]f a litigant seeks to proceed under a pseudonym, at the time of his or her initial filing, the party must file under seal a notice of intention to seek leave to proceed under such pseudonym and disclose the litigant's true name" and file a motion "setting forth the justification under applicable law." This notice and motion "must" then "be served on each opposing party within 7 days of the opposing party's appearance." Consistent with that Rule's spirit, in July 2024 after appearing in the case, IU's counsel asked Speech First's counsel to identify the members on whose behalf the lawsuit is purportedly brought and indicated amenability to the disclosure being sealed and confidential. [ECF30 at 13-14 n.3; *id.* at 18-19 n.4.] To this day, Speech First has not obliged. [*See id.*]

Within 48 hours of filing its Complaint, Speech First filed its motion for a preliminary injunction against "enforc[ement]" of what Speech First calls IU's "bias incidents policy," and saying that "[d]iscovery will not be required for the Court to resolve [this] motion." [ECF9 at 1, 3.] Speech First's submission told the district court, however, that it "must … deny this motion" for lack of requisite standing, citing the Seventh Circuit's decision in *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020), affirming denial of Speech First's request to preliminarily enjoin various policies of another school (the University of Illinois at Urbana-Champaign), including its "Bias Assessment and Response Team," or BART [ECF10 at 5-7], which Speech First calls "materially similar" to the IU Program at issue here [ECF31 at 1-2, 5].

Though Speech First now depicts *Killeen* as affirming the district court's preliminary injunction denial based on the Seventh Circuit's supposed belief that "[t]he government can[not] objectively chill speech without directly prohibiting it" [Pet. 27; *accord id*. at 14, 32], Speech First does not (as it cannot) cite anything in *Killeen* that so suggests [*see generally id*.]. In reality:

- *Killeen* emphasized the "[i]mportan[ce] for our analysis" of "the nature of our review: we must leave the factual findings of the district court undisturbed unless 'on the entire evidence' we are 'left with the definite and firm conviction that a mistake has been committed.'" *Killeen*, 968 F.3d at 637, 639, 643–44 (cites omitted).

- *Killeen* explained that "[t]he district court made several factual findings about BART in particular, and Speech First has not demonstrated that any are clearly erroneous and did not submit evidence disputing many of them," notwithstanding a three-page declaration from Speech First's president ("based on [her] 'familiarity with' anonymous students" and "second- (and sometimes third-) hand information about BART's operations") that the district court deemed "conclusory" and relatively uninformative with respect to the challenged University of Illinois process. *Id*. at 637–39.

- *Killeen* highlighted numerous facts and findings, without suggesting (*contra* Pet. 31) that any "component" is or should be viewed "in isolation." Examples of those many findings included: "being reported to BART … results in essentially no consequences"; "students view the conversations with BART as optional"; BART was not the "thinly veiled threat" that Speech First portrays; "BART interactions with students are private, not recorded in academic or disciplinary records, and not disclosed outside of OSCR without permission"; "[m]ost students contacted by BART do not respond at all, or decline the offer of a meeting, and no consequences occur if a student declines to meet with BART." *Id*. at 634, 639–40, 643 (noting "nothing in the record shows that any individual student fears potential consequences resulting from an invitation to meet with BART, or consequences from declining that invitation, and has self-censored because of those fears"; also, "reports made to BART 'are not 'referred' from BART to the University Police, nor do the police ever investigate an incident reported to BART unless that incident independently was reported to the Police for law enforcement reasons'").

- And, despite Speech First's contrary insinuations [Pet. 15-16], (1) nothing in *Killeen* suggests that the University of Illinois's "bias-response team" was

> "eliminated"; and (2) Speech First sought rehearing of *Killeen* only as to mootness issues irrelevant here [CA7-ECF51 (Case No. 19-2807)], thus saving its collateral attack on *Killeen*'s standing analysis for this subsequent, distinct litigation against a distinct university.

In response to Speech First's preliminary injunction motion requesting its own denial and confessing inability to materially distinguish *Killeen*, IU filed not only a brief opposing the preliminary injunction [ECF30], but also a motion [ECF24] and supporting brief [ECF29] seeking dismissal of the case. Each of those filings explained, *e.g.*, that Speech First's lack of standing is even clearer here than in *Killeen*, which is far from the only authority confirming Speech First's threshold, dispositive failures. IU's brief opposing preliminary injunctive relief also explained why Speech First otherwise cannot carry its burden to show, among other elements, irreparable harm and likelihood of success on the merits. [ECF30.]

In reply, Speech First reiterated that its preliminary injunction motion "must be denied" "promptly" on the "sufficient basis" that precedent forecloses standing, and emphasized that the district court "***shouldn't reach*** [IU's] arguments" about Speech First's failure to identify members and failure to satisfy the multi-prong preliminary injunction test. [ECF31 at 1, 6 (emphasis added).] Speech First also urged the district court to deny the preliminary injunction "now" without "wait[ing] for the parties to finish briefing [the] motion to dismiss," which Speech

First suggested might not prevail because *Killeen* does "not necessarily" foreclose "its standing to sue at all" [*contra* Pet. 19 (saying review is "important" because "[i]f the Seventh Circuit is right in *Killeen*, then bias-response teams are immune from judicial review")].

The district court issued an order that both (a) granted Speech First's request to effectively deny its own preliminary injunction motion for want of standing [App. 14a]; and (b) simply "**STAYED**" the dismissal motion's briefing [App. 14a], despite the petition's representation that the dismissal motion has been "refused" [Pet. 16]. The district court based this preliminary injunction denial on "Speech First's concessions and the factual record established by the parties' filings," including "affidavits and other documentary evidence, the relevant parts of which are uncontested." [App. 4a, 12a.] Beyond recapping parts of *Killeen*'s multi-faceted analysis and Speech First's inability to materially distinguish it [App. 11a-13a], the district court, *e.g.*, set forth language from the IU Program's website, much of which the petition omits, such as the emphasis that "**We Don't** … Take disciplinary action," "Conduct formal investigations," or "Impinge on free speech rights <https://freespeech.iu.edu/> and academic freedom" [App. 6a].

The district court also found that, *e.g.*, Speech First:

- "*admits* that [IU's Program] lacks disciplinary authority and that bias-motivated speech alone is not a Student Code violation at IU" [App. 13a (citing

ECF31 at 3-4; cleaned up & emphasis added); *accord* App. 7a (IU's Program has no "disciplinary function whatsoever," nor any "power to sanction, punish, or otherwise discipline any student for any reason")];

- "*admits* that students are not punished for declining to meet with [IU's Program]" [App. 13a (citing ECF31 at 3-4; cleaned up & emphasis added); *accord id.* (Speech First does not contest that many students either decline or do not respond to the Program's meeting invitations); App. 7a. ("[a]ny student engagement with [the Program] is entirely voluntary"; no penalty or sanction results from abstaining; where students opt to meet, "[the Program] does not ask or require [them] to change what they do or say and leaves no doubt that [they] are not … in trouble" or "being charged with any Code violation")];

- "*admits* that interactions with [IU's Program] are anonymized and not recorded in academic or disciplinary records" [App. 13a (citing ECF31 at 3-4; cleaned up & emphasis added); *accord* App. 7a ("incident reports are kept … secure and private" "in an internal [Program] database and data from them are aggregated—without names or personal identifiers—to track, for example, the volume, categories, and locations of reports" (cleaned up))].

C. Speech First successfully seeks summary affirmance, again urging its own "prompt" loss.

Appealing its requested defeat, Speech First filed a motion asking the Seventh Circuit to summarily affirm the loss—and to do so "expeditiously, without waiting for [IU] to respond." [CA7-ECF6.] The Seventh Circuit indeed summarily affirmed, doing so based on its "careful[] review[]" of, *e.g.*, "the record on appeal" and "the final order of the district court" [App. 2a; *contra* Pet. 25 (Speech First nevertheless suggesting without basis that "the Seventh Circuit did not rely on the district court's factual findings")].

REASONS FOR DENYING THE PETITION

The Seventh Circuit's correct, factbound application of settled standing principles does not warrant this Court's review. First, forgetting its own suggestion that the university process at issue should be viewed in its specific context, Speech First frames its question presented as an improper hypothetical about some abstract conglomeration of unspecified "bias-response teams."

Next, the claimed "3-1 split" that Speech First hopes its academic question will resolve is illusory [*e.g.*, Pet. 26], arising from Speech First's false premise that the Seventh Circuit broke from three others by supposedly holding that "[t]he government can[not] objectively chill speech without directly prohibiting it." [Pet. 27; *accord id.* at 14, 32.] The Seventh Circuit held no such thing, instead correctly applying the settled law and standard of review. The alleged split does not exist.

Last, Speech First's failure to identify the members on whose behalf it is suing creates serious problems with the record in this case, and it raises yet more problems with the organization's standing. The case is thus not a remotely serviceable vehicle for reaching Speech First's purportedly split-closing question. No such split exists, and this appeal would lead nowhere anyway.

This Court should deny certiorari.

I. Speech First improperly asks the Court to decide an abstract question unrelated to the facts of this case.

In focusing its question presented on some unspecified composite of "bias-response teams" and "students" [Pet. i]—rather than on the specific IU Program and students at issue—Speech First may have found itself an interesting subject for academic inquiry. But academic inquiry has no place in an Article III court, including this one. *E.g.*, *Benton v. Maryland*, 395 U.S. 784, 788 (1969) (this Court will not give "an advisory opinion on an abstract or hypothetical question"). Hence Supreme Court Rule 14.1(a)'s requirement that the question presented bear "relation to the circumstances of the case."

Indeed, Speech First itself says (albeit in its petition's last few pages) that circumstances are particularly relevant here because the analysis turns on "the totality" of the bias-response process at issue [Pet. 30], which "must" be "assessed as a whole" and "viewed in context" [*id.* (citing *NRA v. Vullo*, 602 U.S. 175, 193–94 (2024))]. *Accord Vullo*, 602 U.S. at 189–91 (saying that decisions in various circuits—including the Seventh—take "fact-intensive" approaches to the question of "whether a challenged communication is reasonably understood to be a coercive threat," and endorsing such "multifactor" analysis as "a useful, though nonexhaustive, guide").

Speech First's only purported justification for framing its petition in terms of "bias-response teams" generically is its half-hearted assertion that IU's Program is "representative" of "bias-response teams" elsewhere that are "literal speech police." Not so.

Despite Speech First's conspicuous failure to mention many of its features [*see generally* Pet.], the IU Program shows just how starkly reality can differ from the "literal speech police" narrative Speech First portrays. To note but a few examples:

- IU's Program expressly does not "[i]mpinge on free speech rights <https://freespeech.iu.edu/> and academic freedom" in connection with reported incidents. [*Compare*, *e.g.*, App. 6a; ECF25-7 at 3 (IU further explaining in website just-linked that "[s]peech that is hateful, offensive, or inconsistent with [IU's] values is nonetheless protected under the First Amendment"); *with*, *e.g.*, Pet. 2-5, 23 (mentioning none of that, but suggesting without basis that IU's Program is "representative" of those elsewhere that supposedly impinge upon speech that is "hateful," "offensive," etc.); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 337 (5th Cir. 2020) (saying, with emphasis added, that "the [challenged] regulatory policy for speech, including the Acceptable Use Policy, *could* have stated succinctly that students will be disciplined, up to and including academic punishment and criminal referral, for speech that is outside the protection of the First Amendment and, perhaps, Title IX, which covers sexual harassment in institutions receiving federal funds").]

- It expressly does not "[c]onduct formal investigations." [*Compare*, e.g., App. 6a, *with*, *e.g.*, Pet. i (not mentioning this feature, but purporting to define "a bias response team" as one that, *e.g.*, "investigates" reports).]

- It expressly does not "[t]ake disciplinary action." [App. 6a.]

- Indeed, the Program's lack of coercion is so transparent that, as the district court noted, Speech First "*admits* that [the Program] lacks disciplinary authority and that bias-motivated speech alone is not a Student Code violation at IU," "*admits* that students are not punished for declining to meet with [the Program staff]," and "*admits* that interactions with [the Program] are anonymized and not recorded in academic or disciplinary records." [App. 13a (cleaned up; cites omitted; emphases added).]

Rather than meaningfully addressing these and other details of the Program it purports to challenge, Speech First devotes many pages and secondary-source cites to what other people have said about *other* schools, and otherwise copying and pasting much of its petition from *Speech First, Inc. v. Sands* (where one of those other schools succeeded, over Speech First's objection (2023 WL 7164422, at *9 n.3), in obtaining *Munsingwear* vacatur due to mootness (144 S.Ct. 675 (Mar. 4, 2024) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)))).

Wherever Speech First's abstract question about generic "bias-response teams" may have been "presented," it is not presented here. [App. 1a-14a.] And the same goes for the rest of Speech First's cited decisions of the claimed 3-1 "split." *E.g.*, *Killeen*, 968 F.3d at 637–38; *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019); *Fenves*, 979 F.3d at 322; *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022).

II. The alleged 3-1 "split" is illusory, as no circuit conflicts with the Seventh Circuit's correct, factbound application of settled law.

Despite ignoring how bias-response processes materially vary across universities, Speech First rests its core argument—that the Seventh Circuit "split" from its sister circuits and "got it wrong"—on an accusation that the Seventh Circuit did precisely what Speech First's own petition does: "ignore[] the totality" of the process at issue without "assess[ing] [it] as a whole and view[ing] [it] in context." [Pet. 30 (quoting *Vullo*, 602 U.S. at 193–94).] Specifically, Speech First suggests that, rather than heeding those context-specific circumstances, *Killeen* affirmed Speech First's lack of preliminary injunction standing solely "because Illinois' [bias-response] team lacks the power to formally punish students." [*E.g.*, Pet. 14; *accord, e.g.*, *id.* at 27, 32 (suggesting that the Seventh Circuit disagrees that "[t]he government can objectively chill speech without directly prohibiting it").] None of this is true.

In reality, nothing in *Killeen*'s analysis (or in the decisions below) suggests that a bias-response

team's lack of formal punitive power was dispositive. *See* 968 F.3d 628; App. 1a-2a. In fact, *Killeen* recognized that the mere "fact that a public-official defendant lacks direct regulatory or decisionmaking authority ... is not necessarily dispositive." 968 F.3d at 642 (citing *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003)). "What matters," *Killeen* continued, "is the distinction between attempts to convince and attempts to coerce." *Id.* (quoting *Okwedy*, 333 F.3d at 344); *accord* Pet. 27-29 (quoting this same *Okwedy* "distinction," in a section purporting to explain what "[t]he Seventh Circuit got … wrong"); *Vullo*, 602 U.S. at 188 (recognizing "distinction between permissible attempts to persuade and impermissible attempts to coerce").

As an example of an impermissible attempt to coerce, *Killeen* aptly cited *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), where "the Rhode Island Commission to Encourage Morality in Youth sent dozens of notices to a publication distributor stating that certain publications were inappropriate for sales to youth." 968 F.3d at 640. As *Killeen* noted, this "Court characterized th[ose] notices 'virtually as orders' that were 'reasonably understood to be such by the distributor,' with 'invariabl[e] follow[] up by police visitations.'" *Id.* (citing *Bantam Books*, 372 U.S. at 68). "The notices, th[is] Court determined, were really 'thinly veiled threats.'" *Id.*

But "[h]ere," *Killeen* noted, the "district court found no such threats." *Id.* at 640, 642 (Illinois's "actions are, at worst, an 'attempt to convince'"). To the contrary, *Killeen* explained, the district court "made several factual findings about BART in

particular," and "Speech First has not demonstrated that any" of those findings "are clearly erroneous and did not submit evidence disputing many of them." *Id.* at 639. In correctly concluding that those findings required affirmance under settled law, *Killeen* noted the "[i]mportan[ce] for our analysis" of "the nature of our review: we must leave the factual findings of the district court undisturbed unless 'on the entire evidence' we are 'left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 639 (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) (quoting *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 573 (1985)), *abrogated on other grounds by Nken v. Holder*, 556 U.S. 418, 434 (2009)); *accord id.* at 638 ("We review the district court's legal conclusions de novo and findings of fact for clear error," and do "not reverse a district court's grant or denial of a preliminary injunction absent a clear abuse of discretion by the district court" (cites omitted)).

Indeed, the district court findings and record underpinning *Killeen* (and the decision below) go well beyond the bias-response team's mere lack of formal power to punish, thus refuting the petition's core punitive-power-is-not-dispositive argument for certiorari [*e.g.*, Pet. 14, 27, 32]. *See Killeen*, 968 F.3d at 632–35, 637–44; App. 4a-9a, 12a-14a (noting additional evidence undercutting standing and *not* referenced even in *Killeen*, such as Speech First's own "admi[ssions]" as well as express policy language further dispelling any misperceptions of disciplinary power or investigations or impinging free speech).

Rather, in *Killeen* (and below) Speech First's evidentiary failure resulted from the specific, multi-faceted factual context before the district court, featuring multiple findings that Speech First does not challenge [*e.g.*, Pet. 25]. The many findings that *Killeen* highlighted include:

- "[B]eing reported to BART … results in essentially no consequences." *Id.* at 639 (this was "not dispute[d]").

- "[S]tudents view the conversations with BART as optional." *Id.* at 640 ("[t]his … factual finding … distinguishes this case from *Bantam Books, Inc. v. Sullivan*," 372 U.S. 58 (1963)).

- "BART interactions with students are private, not recorded in academic or disciplinary records, and not disclosed outside of OSCR without permission." *Id.* at 643 (noting that "the only examples of BART reporting in the record" are "annual reports BART issues to the public," which "are completely anonymized with essentially no way to track down the identity of" anyone reported to BART).

- There were no "thinly veiled threats," and the invitations to meet with BART are "voluntary" and result in "essentially no consequences." *Id.* at 640.

- "Most students contacted by BART do not respond at all, or decline the offer of a meeting, and no consequences occur if a

student declines to meet with BART." *Id.* at 640 (this "finding of fact is not clearly erroneous," it "supports the conclusions that students do *not* feel compelled to meet," and "nothing in the record shows that any individual student fears potential consequences resulting from an invitation to meet with BART, or consequences from declining that invitation, and has self-censored because of those fears" (emphasis in original)).

- "[T]he disciplinary processes do not apply to students expressing the views the [Speech First's anonymous student-members] wish to express or any other opinions." *Id.* at 639 ("not dispute[d]").

- "Bias-motivated speech alone is not a Student Code violation." *Id.* at 639 ("not dispute[d]"); *accord id.* at 642 ("Speech First did not present evidence to the district court that BART would refer a student to University Police on the basis of speech independent of a violation of the Student Code or because a student declined to respond to BART outreach").

- "While some BART staff are drawn from departments with disciplinary or law enforcement functions, BART has no such functions.... BART has no authority to impose sanctions, and BART does not require any student to change his behavior." *Id.* at 634, 641 (noting evidence

that "reports made to BART 'are not 'referred' from BART to the University Police, nor do the police ever investigate an incident reported to BART unless that incident independently was reported to the Police for law enforcement reasons'"; "Speech First does not contest the district court's finding that BART itself does not have disciplinary authority").

- "[I]t is unclear whether [Speech First's members] would even be likely to be reported to BART …." *Id.* at 639–40.

And in *this* case, Speech First not only conceded its inability to materially distinguish any of *Killeen*'s above and other findings [*see, e.g.*, App. 12a]; it also never ventured to dispute the district court's findings *here*, including the finding that "[a]ny student engagement with [IU's Program] is 'entirely voluntary'" [App. 7a], and the findings about Speech First's many "admi[ssions]" and "concessions" [App. 4a-9a, 11a-14a].

Debunked premise aside, Speech First identifies no certworthy divergence between the Seventh Circuit and its cited sisters (the Fifth, Sixth, and Eleventh). Indeed, despite Speech First (wrongly) faulting *Killeen* for "ignor[ing] the totality" of the process at issue [Pet. 30], Speech First does not and cannot claim that any of its cited Fifth, Sixth, or Eleventh Circuit decisions purported to involve anything even approaching the "totality" of *Killeen*'s underlying findings. Nor does or could Speech First claim that any of those decisions involved the unchallenged findings below in this case.

The Sixth Circuit in *Schlissel*, for example, described a fact pattern missing numerous such findings (*see generally* 939 F.3d 756) and, quite unlike *Killeen* or this case, even determined that the University of Michigan's process "acts by way of implicit threat of punishment and intimidation to quell speech" (*id.* at 765). And whereas *unchallenged* findings here show that "[a]ny student engagement with [IU's Program] is 'entirely voluntary'" [App. 7a; *accord Killeen*, 968 F.3d at 633, 639–43], *Schlissel* found the record there to show that a student "could understand the [University of Michigan's bias-response team] invitation to carry the threat: 'meet or we will refer your case.'" 939 F.3d at 765.

Similarly, the Fifth Circuit in *Fenves* recited a factual landscape without reference to many findings noted above. *See generally* 979 F.3d 319. *Fenves* also observed, *e.g.*, that "the Hate and Bias Incidents Policy provides for 'Interim Measures and Final *Sanctions*,' including *suspension* from campus, residence hall, or classes—or any of the *sanctions* authorized in the Institutional Rules." *Id.* at 333 (emphases added).

The Eleventh Circuit in *Cartwright* stated, early in its analysis, that "[b]ecause this case hasn't progressed past the pleading stage, 'general factual allegations of injury' may suffice so long as they 'plausibly and clearly allege a concrete injury.'" 32 F.4th at 1119. And, like *Schlissel* and *Fenves*, *Cartwright* did not mention many of the findings along the lines above. And again, echoing findings present in *Schlissel* but not in *Killeen* or here, *Cartwright* found that the (University of Central

Florida's) bias-response team essentially threatened students that "if your speech crosses our line, we will come after you." *Cartwright*, 32 F.4th at 1114, 1116, 1119, 1124 n.5.

And like the Seventh Circuit, the Fifth, Sixth, and Eleventh Circuits all based their decisions on the facts before them concerning the initiative at issue. *Compare, e.g.*, *Killeen*, 968 F.3d at 643–44 ("[o]ur analysis of Speech First's evidentiary showing does not, at this stage, speak to its success on the merits," "but to whether it has met its burden to demonstrate that any of its members experience an actual, concrete, and particularized injury as a result of the [challenged] policies for the purpose of standing to pursue a preliminary injunction"), *with, e.*g., *Schlissel*, 939 F.3d at 765 n.1 ("our determination of standing rests on the [case's] preliminary posture" and "do[es] not foreclose the possibility that the University [of Michigan] could introduce facts which, if unrebutted, would demonstrate that Speech First lacks standing"); *Fenves*, 979 F.3d at 322, 335, 338 ("On the record before us, … plaintiff has standing to seek a preliminary injunction" against "overlapping," "allegedly vague regulations, coupled with a range of potential penalties for violating the regulations"); *Cartwright*, 32 F.4th at 1114, 1116, 1119 (noting importance of "providing the fullest possible context" of the "challenged policies" ("discriminatory-harassment" & "Bias-Related Incidents"), "lay[ing] out their relevant provisions in full" "[r]ather than character[izing] them" (cleaned up)); *accord Speech First, Inc. v. Sands*, 69 F.4th 184, 191 (4th Cir. 2023) ("The record before us shows that the district court took seriously its factfinding responsibility," having

"consider[ed] the totality of the record," including "hundreds of pages of exhibits" and "declarations"), *vacated due to mootness per Munsingwear by* 144 S.Ct. 675 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)).

At bottom, no circuit disagrees: Determining whether a plaintiff may challenge a university policy on free-speech grounds requires evaluating the details of the policy and totality of the circumstances. Regardless which circuits conflict with Speech First's caricature of the Seventh Circuit's analysis, none conflicts with the Seventh Circuit's *actual* analysis—a correct application of settled law to unchallenged district court findings.

III. This case is an exceedingly poor vehicle for reaching the allegedly split-closing question.

Beyond the improperly abstract question and lack of a genuine circuit split, several problems make this case a poor vehicle in any event.

To start, Speech First has fallen extraordinarily short of its burden to demonstrate satisfaction of Article III. This is why IU moved to dismiss for want of jurisdiction—a motion that has been stayed pending this appeal, despite Speech First declaring the motion "refused" [Pet. 16]. Critically, the express, distinctive language of the IU Program website itself refutes the alleged "worries" about IU taking action against "hateful," "offensive," or other speech. Speech First was thus, unsurprisingly and in further contrast to its cited cases, forced to leave the district court's findings

entirely unchallenged, and to "*admit*[] that [the Program] lacks disciplinary authority and that bias-motivated speech alone is not a Student Code violation at IU," "*admit*[] that interactions with [the Program] are anonymized and not recorded in academic or disciplinary records," and "*admit*[] that students are not punished for declining to meet with [the Program]" [App. 13a (citing ECF31 at 3-4; cleaned up & emphases added).] Those conceded deficiencies underscore not only Speech First's lack of entitlement to preliminary injunction overall (per the multi-factor test that Speech First successfully urged the courts below not to reach [ECF31 at 1, 6]), but also its lack of standing at all.

Also, despite Speech First citing (at 27-33) this Court's precedent confirming the relevance of an allegedly coerced "reaction" to the alleged coercion (*Vullo*, 602 U.S. at 191 (deeming such "reaction … helpful … in answering the question whether an official seeks to persuade or, instead, to coerce"); *Bantam Books*, 372 U.S. 63, 68 (similar)), Speech First has provided exceedingly little insight on that score. Indeed, Speech First has so far refused to serve even the routine, confidential, under-seal disclosure of the *identities* of the pseudonymous "members" on whose behalf it asserts associational standing to sue. [ECF30 at 13-14 n.3; *id.* at 18-19 n.4.] As a result, this basic information has remained unknown to the courts below and now this Court, further complicating review despite the judicial (and party) interests in such disclosure. *Cf.* S.D. Ind. L.R. 10-1 (requiring those who desire to litigate pseudonymously to at least disclose their identity under seal). Granted, such basic

information is far from necessary to oppose Speech First's position here, in light of the glaring deficiencies and concessions otherwise, but its absence only further highlights Speech First's evidentiary shortfall.

Indeed, as IU flagged below [ECF30 at 18-19 n.4], some circuit authority has recognized an association's failure to identify "at least one [member] by name" as negating associational standing—thus presenting yet another jurisdictional barrier to the question presented. *E.g.*, *Do No Harm v. Pfizer Inc.*, 96 F.4th 106, 115–18 (2d Cir. 2024) (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 498–99 (2009) & *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 221, 235 (1990)) (noting "the only sister circuit to squarely address the question agrees that an association must name its injured members to establish Article III standing" (citing *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.))); *accord, e.g.*, *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1011 (7th Cir. 2021) (noting, without deciding, the question whether *Summers*, 555 U.S. 488, forecloses standing of association that leaves relevant members "unnamed," but noting that "other courts have read *Summers* to expressly require names for associational standing on the pleadings" (citing *Draper*, 827 F.3d at 3 (noting, on an appeal from dismissal motion, that for associational standing, "the association must, at the very least, 'identify a member who has suffered the requisite harm'" (cleaned up) (quoting *Summers*, 555 U.S. at 499)); *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184

(4th Cir. 2013) (explaining, on an appeal from dismissal motion, that a homeowners association had "failed to identify a single specific member" and that "[t]his failure to follow the requirement articulated in *Summers* would seem to doom its representational standing claim" while rejecting attempts to evade *Summers*)).

And the Article III problems with failing to even confidentially identify associational members only exacerbate the Article III concerns that have been expressed over associational-standing doctrine (or for that matter, facial challenges) in the first place. *E.g.*, *Moody v. NetChoice, LLC*, 144 S.Ct. 2383, 2413–14, 2418 n.2 (2024) (Thomas, J., concurring in judgment) ("Associational standing appears to conflict with Article III's injury and redressability requirements in many of the same ways as facial challenges." "Facial challenges are fundamentally at odds with Article III. Because Article III limits federal courts' judicial power to cases or controversies, federal courts 'lac[k] the power to pronounce that [a] statute is unconstitutional' as applied to nonparties." (cite omitted)).

This case is thus beset by jurisdictional problems that go well beyond the question presented, and that would severely complicate this Court's review.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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